

APR 09 2015



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer and
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2015-04

ACTION

MEMORANDUM FOR:

**BUREAU PROCUREMENT OFFICIALS
HEADS OF CONTRACTING OFFICES**

FROM:

Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

Barry E. Berkowitz
for

SUBJECT:

Federal Acquisition Regulation (FAR) Class Deviation:
Prohibition Against Contracting With Entities with Federal
Felony and Federal Criminal Tax Convictions, Unpaid Federal
Tax Assessments and Delinquent Federal Tax Returns

Background

In accordance with Section 523 of Division B, Title I, of the Consolidated and Further Continuing Appropriations Act, 2015 (the Act) (Pub. L. 113-235), none of the funds made available by the Act may be used to enter into a contract in an amount greater than \$5,000,000 unless the prospective contractor certifies in writing to the agency that, to the best of its knowledge and belief, the contractor has (1) filed all Federal tax returns required during the three years preceding the certification (2) has not been convicted of a criminal offense under the Internal Revenue Code of 1986, and (3) has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

In addition, Sections 744 and 745 of Division E, Title VII, of the Act prohibit the use of any of the funds made available by the Act to enter into a contract, including interagency acquisitions, with any corporation that (1) was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interest of the Government; or (2) has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

The Chair of the Civilian Agency Acquisition Council (CAAC) issued a memorandum to encourage agencies to implement appropriations provisions related to suspension and debarment and tax delinquencies; and to extend this deviation to cover the Fiscal Year 2015 Continuing Appropriations Resolution. The CAAC has since opened case 2015-011 for a FAR revision as applicable to the Act concerning Section 523 of Division B, Title I and Sections 744, and 745 of Division E, Title VII.

Purpose

The purpose of this memorandum is to extend a class deviation in accordance with FAR 1.404 to require that contracting officers follow the procedures described herein to comply with Sections 523, 744, and 745 of the Act.

Applicability

This memorandum and class deviation are applicable to contracts, including funding modifications to existing contracts; task orders against contracts including Federal Supply Schedule; orders under multiple awards contracts per FAR 16.505; architect and engineer acquisitions pursuant to FAR part 36; and contracts and task orders resulting through interagency acquisitions funded by the Act and similar provisions in subsequent appropriations acts.

Required Actions

1. Representation by Offeror/Contractor (Written Solicitation)

Contracting officers shall:

- a) Include the *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* (Attachment B) in **any solicitation** for award of a contract, including funding modifications to existing contracts, or task order against a contract, including contracts or task orders resulting from an interagency acquisition requiring Fiscal Year 2015 Consolidated Appropriations funding; and
- b) Obtain a completed *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* from offerors prior to award of a contract, or task order against a contract, including contracts or task orders resulting from an interagency acquisition or modification to such actions which obligate Fiscal Year 2015 Consolidated Appropriations funding.
- c) Ensure that the appropriate representations are completed for contracts or task orders that result from an interagency acquisition where funds made available by the Act will be obligated.

2. Assurances by Offeror/Contractor (No Written Solicitation)

Contracting officers shall:

- a) Include the *Assurance by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* (Attachment C) in all awards for which a written solicitation is not issued, e.g., placement of a task or

delivery order against a General Services Administration (GSA) Federal Supply Schedule (FSS) contract or an order under an indefinite delivery vehicle (IDV), an open market order, the exercise of an option or other types of funding modifications to existing contracts or orders, including those resulting from an interagency acquisition, requiring Fiscal Year 2015 Consolidated Appropriations funding; and

- b) Ensure the appropriate assurance(s) are included for contracts and task orders against contracts including Federal Supply Schedule; and contracts and task orders resulting through interagency acquisitions funded by the Act.

3. Remediation of Affirmative Representation

In the event of an affirmative representation or declination of assurance, contracting officers shall:

- a) Notify the Suspending and Debarring Official in accordance with the procedures outlined in Section VI of the *Department of Commerce Suspension and Debarment Handbook* prior to award; and
- b) Comply with the determination of eligibility by the Suspending and Debarring Official.

4. Certification by Offeror/Contractor (Contracts exceeding \$5 million)

Contracting officers shall:

- a) Include the *Certification by Offerors Regarding Federal Tax Filing and Federal Income Tax Violations* (Attachment D) in any solicitation for award of a contract, or task order against a contract, including contracts or task orders resulting from an interagency acquisition requiring Fiscal Year 2015 Consolidated Appropriations funding if the anticipated award exceeds \$5 million.

Effective Date

This Procurement Memorandum is effective immediately and supersedes the previous version of Procurement Memorandum 2014-02 dated May 30, 2014. This class deviation is effective until it is incorporated into the FAR or is otherwise rescinded.

The point of contact for this matter is Virna Winters who may be reached at 202-482-3438 or vwinters@doc.gov

cc: Acquisition Community
Acquisition Council
Office of General Counsel

CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION

Reference FAR Parts 9, 12, 13, 15, 14, 35, 36 and 43 –Prohibition Against Contracting With Entities with Federal Felony and Federal Criminal Tax Convictions, Unpaid Federal Tax Assessments and Delinquent Federal Tax Returns

Determination and Findings

The Department of Commerce is authorizing a class deviation which prescribes required actions to address compliance with the prohibitions contained in Section 523 of Division B, Title I, and Sections 744, and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235).

Findings

In accordance with Section 523 of division B, Title I, of the Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235), none of the funds made available by the Act may be used to enter into a contract in an amount greater than \$5,000,000 unless the prospective contractor certifies in writing to the agency that, to the best of its knowledge and belief, the contractor has filed all Federal tax returns required during the three years preceding the certification, has not been convicted of a criminal offense under the Internal Revenue Code of 1986, and has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

Sections 744 and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), prohibit the use of any of the funds made available by the Act to enter into a contract with any corporation that was (a) convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless an agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government; **or** (b) has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless an agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government.

The Chair of the Civilian Agency Acquisition Council (CAAC) issued a memorandum to encourage agencies to implement appropriations provisions related to suspension and debarment and tax delinquencies; and to extend this deviation to cover Fiscal Year 2015 Continuing Appropriations Resolution. The CAAC has since opened case 2015-011 for a FAR revision as applicable to the Act concerning Section 523 of Division B, Title I and Sections 744, and 745 of Division E, Title VII.

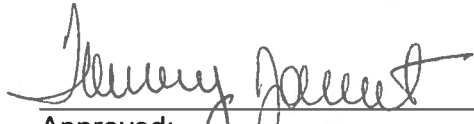
The attached representation, assurance, and certifications will provide contracting officers sufficient information to comply with Sections 523, 744, and 745. The required actions prescribed herein are applicable to all contracts, task orders against contracts including Federal Supply Schedules, and contracts and task orders resulting through interagency acquisitions.

Appropriate action will be taken by the Suspending and Debarring Official, with legal counsel, in accordance with the prohibitions contained in the Act.

Determination

In accordance with FAR 1.404, I hereby authorize this class deviation requiring contracting officers, prior to obligation of the Consolidated and Further Continuing Appropriations Act, 2015 funding, to: (a) obtain representations, assurances, and certifications from offerors/contractors; (b) require use of the DOC representations, assurances, and certifications by servicing agencies under interagency acquisitions; and (c) obtain a determination of eligibility from the Suspension and Debarment Official, DOC, in the event of an affirmative representation. This determination is based on analysis of the findings described herein.

This class deviation will remain in effect until it is incorporated into the FAR or is otherwise rescinded.



Approved:
Barry E. Berkowitz
Senior Procurement Executive and *for*
Director for Acquisition Management

4/9/15
Date:

Contracting officers shall include the following language *in all solicitations* for award for contracts, including funding modifications to existing contracts, prior to obligation of the Consolidated and Further Continuing Appropriations Act 2015 funding:

Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2015)

- (1) In accordance with Sections 744 and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), none of the funds made available by the Consolidated and Further Continuing Appropriations Act, 2015 funding may be used to enter into a contract with any corporation that-
 - (a) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where an awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government, or
 - (b) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.
- (2) The Offeror represents that, as of the date of this offer -
 - (a) It is ☐ is not ☐ a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.
 - (b) It is ☐ is not ☐ a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

(End of provision)

Attachment C

Contracting officers shall include the following language *in all awards* for which a written solicitation is not issued, e.g., placement of a task or delivery order against a General Services Administration (GSA) Federal Supply Schedule (FSS) contract or an order under an indefinite delivery vehicle (IDV), an open market order, the exercise of an option or other types of funding modifications to existing contracts, prior to obligation of Consolidated and Further Continuing Appropriations Act, 2015 and subsequent appropriations act funding:

Assurance by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2015)

- (1) In accordance with Sections 744 and 745 of Division E, Title VII, of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235), none of the funds made available by Consolidated and Further Continuing Appropriations Act, 2015 and subsequent appropriations acts may be used to enter into a contract with any corporation that -
 - (a) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where an awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government, or
 - (b) Has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.
- (2) *By accepting this award or order, in writing or by performance*, the offeror/contractor assures that -
 - (a) The offeror/contractor is not a corporation convicted of a felony criminal violation under a Federal law within the preceding 24 months.
 - (b) The offeror/contractor is not a corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

(End of Provision)

**CERTIFICATION BY OFFERORS REGARDING FEDERAL INCOME TAX FILING AND
FEDERAL INCOME TAX VIOLATIONS. (Class Deviation) (March 2015)**

(a) In accordance with Section 523 of Division B, Consolidated and Further Continuing Appropriations Act, 2015, (Pub. L. 113-235) none of the funds made available by the Act may be used to enter into a contract in an amount greater than \$5,000,000 unless the prospective contractor certifies in writing to the U.S. Consolidated and Further Continuing that, to the best of its knowledge and belief, the contractor has filed all Federal tax returns required during the three years preceding the certification, has not been convicted of a criminal offense under the Internal Revenue Code of 1986, and has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

(b) The offeror's proposal shall include a signed written certification as follows – To the best of my knowledge and belief, ---(name of offeror)--- has filed the Federal tax returns required during the three years preceding this certification, has not been convicted of a criminal offense under the Internal Revenue Code of 1986, and has not, more than 90 days prior to certification, been notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

Firm _____
Signature _____
Name _____
Title _____
Date of execution _____

(End of Provision)